In the Supreme Court

OF THE

United States

OCTOBER TERM, 1946

No. 123

MURIEL C. PISTOLESI,
Petitioner,

vs.

MASSACHUSETTS MUTUAL LIFE INSURANCE COMPANY,
Respondent.

PETITION FOR WRIT OF CERTIORARI
to the United States Circuit Court of Appeals
for the Ninth Circuit
and
BRIEF IN SUPPORT THEREOF.

HERBERT W. ERSKINE,
625 Market Street, San Francisco 5, California,
Attorney for Petitioner.

M. MITCHELL BOURQUIN,
Crocker Building, San Francisco 4, California,

JOHN J. HEALY,
68 Post Street, San Francisco 4, California,

S. J. H. ALLEN,
Law Library, San Francisco 2, California,
of Counsel.

Subject Index

Table of Authorities Cited

Statutes

Texts

In the Supreme Court
OF THE
United States

OCTOBER TERM, 1946

No.

MURIEL C. PISTOLESI,	*Petitioner,*
VS.	
MASSACHUSETTS MUTUAL LIFE INSURANCE COMPANY,	*Respondent.*

PETITION FOR WRIT OF CERTIORARI
to the United States Circuit Court of Appeals
for the Ninth Circuit.

To the Honorable Fred M. Vinson, Chief Justice of the United States, and to the Honorable Associate Justices of the Supreme Court of the United States:

Your petitioner, Muriel C. Pistolesi, respectfully prays that a writ of certiorari be issued by this Court to review the decision of the United States Circuit Court of Appeals for the Ninth Circuit, and its subsequent order for modification thereof, reversing the

judgment of the United States District Court for the Northern District of California in the sum of $8,674.16 entered upon the verdict of a jury for the petitioner.

OPINIONS BELOW.

The opinion of the District Court is reported in 64 Federal Supplement 427 and is also printed in the Record at pages 33 to 44.

The modified opinion of the Circuit Court of Appeals has not been reported but appears in the Record at page 296.

The original opinion of the Circuit Court of Appeals has not been incorporated in the Record but is set forth herein as Appendix "A".

A petition for rehearing by your petitioner was denied by the Circuit Court of Appeals. It simultaneously ordered a modification of the language of the opinion and added a paragraph precluding a new trial. Such modification order has not been included as part of the Record but is set forth herein as Appendix "B".

JURISDICTION.

The original opinion of the Circuit Court of Appeals for the Ninth Circuit was filed March 7, 1947. The Modification Order and Denial of Petition for Rehearing was filed May 2, 1947. The mandate was stayed until June 14, 1947 pending the filing of this petition for certiorari.

Jurisdiction to review this case upon writ of certiorari is conferred upon this Court by Section 240(a) of the Judicial Code as amended by the Act of February 13, 1925, U.S.C. Section 347(a); 8 F.C.A. Title 28, Section 347(a).

SUMMARY STATEMENT OF THE MATTER INVOLVED.

Muriel C. Pistolesi, the petitioner herein, is the widowed beneficiary of Norbert H. Pistolesi, the deceased insured under two life insurance policies issued by the respondent, Massachusetts Mutual Life Insurance Company. Identical double indemnity riders were attached to and incorporated in the policies in consideration of the payment of additional premiums for coverage against death from accidental means.

On September 14, 1941, the Pistolesi family, petitioner, insured and their small son, went sailing with friends on a large yacht, the "Eloise". During the cruise Mr. Pistolesi, perched high on one of the two masts of the vessel, started hand over hand to cross a cable stretched between the masts, 35 to 50 feet above the moving 86 foot hull. After advancing a short distance on the cable he "slipped and fell" (R. 108); "slumped down and twisted around" (R. 132); "twist(ed) and jerk(ed) around" (R. 131), but managed to retain a one handed grip, avoid crashing to the deck below, and recover sufficiently to make his way back to his starting place on the mast. At this point a friend on the deck, who had followed the entire episode in the finder of his camera, snapped a picture.

(R. 131, 133.) After resting on the mast for a time Mr. Pistolesi slid down a cable to the deck and almost immediately complained he "slipped and fell", "thought he was a goner" and was in "terrific pain", whereupon he sat down and rested, being "ghastly white", "lips blue", "covered with heavy beads of perspiration" and "breathing exceptionally hard". (R. 72, 106, 107, 108, 136.) Later in the day he tired easily and was unable to perform his usual gymnastics on paddle boards while in the water with his little boy. (R. 72, 73, 75, 142, 143.) At the conclusion of the trip the petitioner drove him home, he immediately went to bed, and thereafter suffered general weakness and debility, had a drawn countenance, and his feet shuffled as he walked. (R. 72, 107, 108, 136; Trial Court's Opinion, R. 34.) All of the manifestations of a severe heart injury apparent immediately after the accident, blue lips (cyanosis), extreme pallor, labored breathing and profuse perspiration, subsequently reappeared upon any physical exertion, including lifting a dog house (R. 77), getting wood (R. 78), trimming a hedge (R. 78) and at various other times. (R. 159, 182.)

Less than three weeks after the accident Mr. Pistolesi was dead at the age of 39. During the early morning hours of October 5, 1941, he awakened in excruciating pain, Dr. Wagner was called, an ambulance was sent for, but he died before he could be removed to a hospital. His body was cremated two days later in accordance with his previously expressed desires (R. 183); no autopsy was performed; Mrs. Pistolesi did not know of the existence of the insurance policies

until the day after the funeral when a friend, Mr. Ireland, took the policies to her. (R. 183, 116, 129.)

Mr. Pistolesi was considered by every witness who knew him, including respondent's sole lay witness, to have been in exceptionally fine health prior to the trip on the "Eloise". He was a clean living family man of moderate habits, well proportioned, athletic of stature and demeanor, a fine swimmer, boxer, squash and badminton player, skier and yachtsman—unusually vigorous, strong and of great vitality. (R. 67, 139, 155, 157, 158, 224. Respondent's witness R. 218.)

The double indemnity provision in both policies in pertinent part reads as follows:

> "Upon receipt of due proof that the death of the insured occurred * * * as the result of bodily injury effected solely through external, violent, and accidental means, as evidence of which injury (except in case of drowning or of internal injuries revealed by an autopsy) there is a visible contusion or wound on the exterior of the body, and that such death occurred within ninety days after sustaining such injury and as a direct result thereof, independently and exclusively of all other causes * * *"

> "* * * The Company shall have the right and opportunity to examine the body and make an autopsy unless prohibited by law." (R. 83, 87.)

THE VERDICT, JUDGMENT AND OPINION OF THE CIRCUIT COURT OF APPEALS.

The jury found the death of Mr. Pistolesi occurred as the result of bodily injury effected solely through external violent and accidental means.

The District Court in its opinion decisively concurred in this finding of the jury thus:

> "The evidence in this case,—in the Court's opinion,—was clear and convincing that the insured met his death solely through accidental means." (R. 34.)

The jury found under proper instructions of the trial Court that the accidental means injury was evidenced by a visible contusion or wound on the exterior of the body within the meaning and intendments of the policies as a whole.

On a subsequent motion for judgment notwithstanding the verdict or a new trial, the trial Court rendered an informed and comprehensive opinion in which it reviewed the facts, applicable principles of law and pertinent authorities, and sustained the verdict of the jury that the accidental means injury was evidenced by a contusion or wound on the exterior of the body within the meaning and intendments of the policy.

Upon appeal the Circuit Court reversed the petitioner's judgment in an opinion containing such an incomplete and inconsistent statement of facts, and conclusion of law encompassing them, that it ordered a modification of its opinion designed to reconcile the inconsistency and contradiction. In doing so it de-

clined to grant your petitioner's petition for rehearing which had demonstrated such fallacies as one of the grounds requiring reconsideration of the decision. The modification order went further, and, pursuant to Respondent's request by petition for modification, precluded a retrial which the original opinion had not foreclosed.

In denying that rehearing, the Circuit Court declined to decide, as it did in its original decision, the issue which immediately arose and became predominant upon its determination, contrary to that of the jury, that the fatal heart injury was not evidenced by a "contusion" or "wound" within the meaning of the policies. That issue, strenuously urged by the petitioner in response to the Respondent's appeal and again as a primary basis for rehearing, and now for a writ of certiorari by this Court, is:

> Whether the accidental means death from wholly internal injury is encompassed by the double indemnity provisions of the policies where the accident is such that a "contusion" or "wound", as restricted by the Circuit Court's opinion, cannot occur because no external impact, blow or penetration was involved in the fatal accidental violence, *and failure to have an autopsy was excused.*

The double indemnity provisions contain internal injury exceptions from the contusion or wound requirement, reading:

> "* * * (except in cases of drowning or of internal injuries revealed by autopsy) * * *"

QUESTIONS PRESENTED.

The questions presented by petitioner's petition herein for writ of certiorari are:

1. Where a verdict of a jury, based upon appropriate instructions unassailed by the appellate tribunal, has determined liability exists under a general double indemnity provision encompassing all accidental means injuries evidenced by contusions or wounds, can the appellate tribunal decree or order a reversal without deciding the issue of law which takes form upon its arrival at a conclusion opposite to that of the jury; that issue being:

> Whether the fatal accidental means internal injury falls within the policies' exceptive words eliminating the contusion or wound requirement where the injuries are internal— "* * * (*except in cases of drowning or of internal injuries revealed by autopsy*) * * *", and performance of an autopsy is excused?

2. May an Appellate Court arrive at a conclusion opposite to that of the jury simply and exclusively by reliance upon expert opinion testimony as to the meaning of wording in the policies which is the ultimate issue to be decided by the jury in obedience to proper instructions of the trial Court, when a timely objection to its admission is made during the trial?

3. Assuming such opinion testimony was admissible over objection, was it not merely evidence to be weighed subject to the jury's determination as to credibility of the witness and does not an Appellate Court's reversal based primarily on such opinion testimony invade the jury's exclusive historical function

to weigh the evidence and judge the credibility of witnesses?

4. Is not the Circuit Court's decision on the contusion or wound issue contrary to the California rules for construction of insurance policies, contrary to all indications of what the California rule would be, and contrary to the better reasoned Federal and State decisions constituting the weight of authority?

REASONS RELIED ON FOR ALLOWANCE OF THE WRIT.

I.

If it be assumed, arguendo, the errors committed by the Circuit Court in reversing the judgment on the "contusion" or "wound" issue do not require review by this Court, the clause specifically excepting wholly internal injuries from the operation of the "contusion" or "wound" requirement of the double indemnity provision must now be construed, and the intent of its drafters in the light of the entire insurance contract must be passed upon and decided, before affirmance or reversal of the judgment may properly be decreed or ordered. As the matter now stands the petitioner's judgment has been dissipated and she is faced with costs in excess of $1,060.00, on the basis of Respondent's cost bill, exclusive of her own costs, as a result of a determination by the Circuit Court of what, by its decision, has become simply the preliminary issue.

II.

Petitioner's intensive search has disclosed no determination, by this or any Federal Court, of the now

predominant issue which the Circuit Court for the Ninth Circuit has failed to decide, which issue is a most important question of law and one determinative of the rights of innumerable policy holders.

III.

The decision of the Circuit Court on the contusion or wound issue is predicated upon the inadmissible opinion of an expert medical witness, over proper and timely objection of counsel, on the ultimate issue for determination by the jury under appropriate instructions from the trial Court, namely, whether the manifestations of internal injury constituted "contusions" or "wounds" within the intendments of the policies. Part of such testimony is quoted by the Circuit Court in its opinion and is designated by it as "uncontradicted medical testimony".

IV.

If the opinion of the medical expert on the ultimate issue was admissible, it was merely evidence to be weighed by the jury, subject to its prerogative of testing the credibility of the witness, and an invasion of those functions by an appellate tribunal to arrive at a conclusion opposite to that of the jury may not be countenanced.

V.

If the testimony of the expert witness on the ultimate issue should be held to have been properly controlling to the extent that it was incumbent upon the Appellate Court to reverse the verdict, a new trial should be permitted in order to afford the petitioner

an opportunity to refute such opinion evidence, as it is respectfully submitted such has not heretofore been the state of the law.

VI.

The Circuit Court's expressed concept of the California rule for construction of the language of insurance policies recognizes but an isolated segment thereof, and is inconsistent with the rule as a whole as expressed by the great weight of those decisions.

VII.

The Circuit Court's decision is contrary to existing indications of what the holding of the California Courts would be on the contusion or wound issue.

VIII.

There is a severe conflict in the decisions of the various Circuit and District Courts on the contusion or wound issue, and the single case from the 10th Circuit relied upon and followed by the Circuit Court specifically states that it made such decision in the absence of any guidance by the Oklahoma State Court, a situation not paralleled here. There has been no decision of the United States Supreme Court which construes a contusion or wound double indemnity accidental means provision of an insurance policy.

PRAYER.

Wherefore, petitioner prays that a writ of certiorari be issued by this Court directed to the United States Circuit Court of Appeals for the Ninth Circuit, to the end that the said opinion and judgment of the said Court in the above entitled cause be reviewed by this Court, and that upon such review, said judgment of the Circuit Court of Appeals be reversed and that petitioner be allowed such other relief as this Court may deem meet and proper in the premises.

Dated, San Francisco, California,
June 9, 1947.

HERBERT W. ERSKINE,
Attorney for Petitioner.

M. MITCHELL BOURQUIN,
JOHN J. HEALY,
S. J. H. ALLEN,
of Counsel.

In the Supreme Court
OF THE
United States

OCTOBER TERM, 1946

No.

MURIEL C. PISTOLESI,
Petitioner,

vs.

MASSACHUSETTS MUTUAL LIFE INSURANCE COMPANY,
Respondent.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

OPINIONS BELOW.

The opinion of the Circuit Court of Appeals, as modified (R. 296), has not yet been reported. The opinion of the District Court (R. 33) is reported at 64 Fed. Supp. 427.

The original opinion of the Circuit Court is set forth as Appendix "A" hereto, and the order of modification as Appendix "B".

JURISDICTION.

The grounds upon which jurisdiction of this Court is invoked are stated in the petition at page 2.

STATEMENT OF THE CASE.

The essential facts of the case are fully stated in the petition at pages 3 to 5 and in the interests of brevity are not repeated here.

SPECIFICATION OF ERRORS.

The Circuit Court of Appeals for the Ninth Circuit erred in its disposition of the appeal:

(1) In deciding only what became the preliminary issue in view of the decision reached;

(2) In failing to decide the ultimately predominant issue which immediately arose upon its decision of what became merely the preliminary issue in view of the decision reached;

(3) In invading the jury's historical function to weigh the conflicting evidence and judge the credibility of witnesses to reach a conclusion contrary to that of the jury (and trial Court);

(4) In relying upon inadmissible expert opinion evidence, over timely objection, on the ultimate issue to be decided by the jury;

(5) In precluding a new trial;

(6) In deciding the issue passed upon contrary to the existing indications of what the ruling of

the State Courts would be, and contrary to the better considered Federal and State decisions;

(7) In construing the language of the policies contra to the State rule of construction.

THE ARGUMENT.

1. AN ISSUE, AS YET UNDETERMINED, MUST BE DECIDED TO SUPPORT EITHER AFFIRMANCE OR REVERSAL.

The opinion of the Circuit Court of Appeals determines only what becomes the preliminary issue once it decides the manifestations of blue lips, extreme pallor, labored breathing, profuse perspiration, loss of vigor, drawn countenance and shuffling gait do not satisfy the "contusion" or "wound" requirement within the intendments of the double indemnity provisions of the policies.

The opinion does not consider, and hence does not determine, what thereupon becomes the predominant and controlling issue—whether the accidental death from wholly internal injuries is encompassed by the double indemnity provisions of the policies where the accident is such that a "contusion" or "wound", as restricted in meaning by the Circuit Court's opinion, cannot occur because no external impact, blow or penetration was involved in the fatal accidental violence.

The double indemnity provisions of these policies contain internal injury exceptions from the contusion or wound requirements, reading:

> "* * * (except in cases of drowning or of internal injuries revealed by an autopsy) * * *"

This specific exception of wholly internal injuries from the operation of the "contusion" or "wound" requirement of the double indemnity clause must now be construed, and the intent of the drafters in the light of the entire insurance contract must be passed upon and decided, before affirmance or reversal may be decreed or ordered.

Performance of an autopsy was excused under the circumstances of this case. Mrs. Pistolesi did not know of the existence of the insurance policies, and consequently of their provisions, until after cremation in accordance with the frequently expressed wishes of her deceased husband, and until the day after the funeral when her friend, Mr. Ireland, delivered them to her. (R. 183, 116, 129.) Both the Federal and California Courts hold such circumstances excuse compliance with autopsy provisions:

Ocean Accident and Guar. Corp. v. Schachner, 70 F. (2d) 28 at 29;

Ellis v. Order of United Commercial Travelers of Amer., 20 Cal. (2d) 290, 295 et seq., 125 P. (2d) 457;

Travelers Ins. Co. v. Welch, 82 F. (2d) 799.

See also

Trueblood v. Maryland Casualty Assn. Co., 129 Cal. App. 102, 18 P. (2d) 90.

The autopsy requirement in the exception being but a "method of proof" of internal injuries (properly so designated by the now Respondent in its argument to the Circuit Court—Appellant's Brief page 10) and that method of proof being excused under the circum-

stances of this case, other evidence of fatal accidental internal injuries establishes double indemnity liability under the exception to the contusion or wound requirement.

The last sentence of the double indemnity provision hereinbefore quoted illustrates beyond question that the autopsy requirement is conditioned upon the nonexistence of a legal prohibition against autopsy, as it expressly provides:

> "* * *. The Company shall have the right and opportunity to examine the body and make an autopsy unless prohibited by law. * * *"

If autopsy is probibited by law the exception in effect reads:

> "* * * (except in case of drowning or of internal injuries revealed by ~~an autopsy~~ *satisfactory proof*) * * *"

and by the same token, if autopsy is excused by the law under the circumstances of the case, as it is here, the exception in effect also reads:

> "* * * (except in case of drowning or of internal injuries revealed by ~~an autopsy~~ *satisfactory proof*)* * *".

Visible marks, signs and manifestations such as blue lips, extreme palor, labored breathing, profuse perspiration, loss of vigor, shuffling gait, and the like, repeatedly have been held sufficient evidence of internal injuries to support double indemnity verdicts where the "contusion" or "wound" issue is not involved. (And by the weight of authority where that issue was

involved, cases infra.) Such proof is held to afford ample and adequate protection to the insurance companies against fraudulent claims, which is the objective of the clause. Many such authorities are collected in 39 A.L.R. 1011 and 49 L.N.S. 1022; 1 Appleman, Insurance Law and Practice, pp. 482 and 487 et seq.; 6 Cooley's Briefs on Insurance, 2nd Ed., pp. 5318, 5316 et seq. A typical case is that of *Horsfall v. Pacific Mutual Life,* 32 Wash. 132, 72 P. 1028, which was followed by the California District Court of Appeal, hearing denied by the Supreme Court, in *Trueblood v. Maryland Assurance Co. of Baltimore,* 129 Cal. App. 102, 108, 18 P. (2d) 90, 92, and reaffirmed by the "contusion or wound or visible mark at the place of injury" case of *Hill v. Great Northern Life Insurance Co.,* 186 Wash. 167, 57 P. (2d) 405 (brain hemorrhage).

Such evidence clearly constitutes satisfactory proof, under the exception to the contusion or wound requirement, as a substitute for the excused autopsy.

An apt illustration of the principle that double indemnity liability is incurred where the fatal accidental means injury is such that no "contusion" or "wound", in the restricted sense adopted by the Circuit Court, could occur because no external impact, blow or penetration was involved, is found in the case of *Lewis v. Brotherhood Accident Co.,* 194 Mass. 1, 7, 79 N.E. 802, 804, from which the following excerpt is quoted:

> "Suppose two persons, each having a policy like this, are accidentally swept overboard from a ship by the same wave. One goes clear and receives no

dental means internal injury sufficient to negative a false or fraudulent claim, double indemnity liability is established under the exception. The forceful dissenting opinion of Circuit Judge Soper in the *Powell* case concludes that where manifestations satisfactorily disclose fatal accidental internal injuries which cannot involve "contusions" or "wounds" in the restricted sense, liability is established without contusion, wound or autopsy, and such dissent is an expression which, without question, lends strong support to a conclusion of liability where there is the additional element in the case that the autopsy requirement is excused.

The *Warbende* case, diametrically opposed to the conclusion reached by the Ninth Circuit Court and the *Stanfield* case, infra, cited and relied on by it, held the contusion or wound requirement satisfied in a sunstroke case almost identical in fact with the *Stanfield* case, and went on to observe in its closing paragraph at page 754:

> "* * *. That is if the internal injuries, which cause death, are revealed by an autopsy it is immaterial whether there be a visible contusion or wound on the exterior of the body. But if there is a visible contusion or wound on the exterior of the body which evidences 'the means', it is immaterial whether internal injuries be revealed by an autopsy or by other satisfactory evidence. The provision 'except in case of drowning or of internal injuries revealed by an autopsy' does not impose a burden upon the claimant, but when there are internal injuries *revealed by an* autopsy the provision relieves the claimant of any disadvantage in making proof of the claim in case

> the 'means' have not caused a contusion or wound on the exterior of the body. Of course, in either case, the plaintiff must establish that the 'bodily injuries' which cause death, are effected solely through external violent and accidental means." (Italics theirs.)

It is respectfully submitted the exception clearly excludes wholly internal injuries, which cannot involve an external impact, blow or penetration, from the contusion or wound requirement. That is the only reasonable and tenable construction of the intention of the insurance company and the language employed by it in drawing up the insurance contract as a whole and the clause specifically exempting internal injuries from the "contusion" or "wound" requirement. The autopsy limitation being excused, other satisfactory proof of accidental internal injury is an adequate substitute creating liability under the internal injury exception. This Honorable Court is respectfully urged to grant the writ of certiorari prayed for to consider and resolve this issue and important question of law, heretofore undecided by this Court or any other United States Court. Upon this issue, which the Circuit Court did not resolve, the evidence is more than sufficient, and there would be no justification for disturbing the jury's verdict. (The insurance doctor himself, in the testimony erroneously relied on by the Circuit Court for reversal, as next hereinafter discussed, testified that pallor and blue lips were evidences of a failing or damaged heart. [R. 239, 240, 241.]) It is also most respectfully submitted it would be extremely unjust for the petitioner to be held to the

The Court. He may answer.

A. May I explain my answer after I make it?

Mr. Healy. The jury is not to be guided by what this man thinks it is, but by what Your Honor instructs them." (R. 169.)

"The Court. The jury has said that it would follow my instructions. He may answer the question.

A. No." (R. 239.)

* * * * * * *

"Q. State whether blue lips are wounds or contusions.

A. Blue lips are not a wound or contusion, not a bruise.

Mr. Healy. I move to strike the answer as not responsive, it can be answered yes or no.

A. The answer is no." (R. 240, Court's Opinion, R. 300.)

* * * * * * *

"Q. State whether profuse perspiration is a wound or contusion.

A. It is a result of over-heating the body or the result of weakness, or a reversible thing not the result of any damage, nor damaging in itself.

Q. Is it a wound or contusion?

A. It is not." (R. 242.)

Under familiar and firmly established principles the opinions of experts on such matters are inadmissible in evidence and should not have been relied upon by the Circuit Court in reversing the judgment. The following expression of this Court in *U. S. v. Spaulding*, 293 U. S. 498, 506, 55 S. Ct. 273, 79 L. Ed. 617, is indicative of the rule:

"The medical opinions that respondent became totally and permanently disabled before his policy lapsed are without weight. Clearly the experts failed to give proper weight to his fitness for naval air service or to the work he performed, and misinterpreted 'total permanent disability' as used in the policy and statute authorizing the insurance. Moreover, that question is not to be resolved by opinion evidence. It was the ultimate issue to be decided by the jury upon all the evidence in obedience to the judge's instructions as to the meaning of the crucial phrase, and other questions of law. The experts ought not to have been asked or allowed to state their conclusions on the whole case. Milwaukee & St. Paul Ry. Co. v. Kellogg, 94 U. S. 469, 472. Schmieder v. Barney, 113 U. S. 645, 648. Fireman's Ins. Co. v. J. H. Mohlman Co., 91 Fed. 85, 88. Mullins Lumber Co. v. Williamson & Brown Co., 255 Fed. 645, 646. Germantown Trust Co. v. Lederer, 263 Fed. 672, 676."

If such opinions were admissible, they were not conclusive "uncontradicted medical testimony" demanding and requiring a reversal of the jury's findings. This principle was fully explored by this Court in the recent case of *Sartor v. Arkansas Gas Corp.,* 321 U. S. 620, 627, 64 S. Ct. 724, 88 L. Ed. 967, and was the predominant factor in the granting of the writ of certiorari and reversal of the judgment therein. The opinion in the *Sartor* case reviews many of the authorities demonstrating the error of the Circuit Court in relying upon such testimony for reversal of the finding of the jury in the instant case. In one of those cited cases, *The Conqueror,* 166

U. S. 110, 133, 17 S. Ct. 510, 41 L. Ed. 937, the following conclusive language is found:

> "In short, as stated by a recent writer upon expert testimony, the ultimate weight to be given to the testimony of experts is a question to be determined by the jury; and there is no rule of law which requires them to surrender their judgment, or to give controlling influence to the opinions of scientific witnesses. (Citing cases.)"

It is respectfully submitted that it is indisputable that the Circuit Court of Appeals has erroneously substituted its conclusion for that of the jury by a usurpation of the jury's exclusive function to weigh the evidence and judge the credibility of this witness whose testimony the jury declined to consider creditable. In doing so, it has also overlooked the firm principle that an Appellate Court must assume as established all the facts that the evidence supporting the plaintiff's claim reasonably tends to prove, and there should be drawn in her favor all the inferences fairly deducible from such facts. Two excerpts from the opinion in *Lavender v. Kurn,* 327 U. S. 645, 652, 90 L. Ed. 692, 696, 66 S. Ct. 740, 743-744, indicate that the Circuit Court has exceeded its own function:

> "* * *. Under these circumstances it would be an undue invasion of the jury's historical function for an Appellate Court to weigh the conflicting evidence, judge the credibility of witnesses and arrive at a conclusion opposite from the one reached by the jury. (Citing cases)."

> "* * *. But, where, as here, there is an evidentiary basis for the jury's verdict, the jury is free to discard or disbelieve whatever facts

are inconsistent with its conclusion. And the Appellate Court's function is exhausted when that evidentiary basis becomes apparent, it being immaterial that the Court might draw a contrary inference or feel that another conclusion is more reasonable."

To similar effect:

Amaral v. United Benefit Life, 74 Adv. Cal. App. 217, 221, 168 P. (2d) 482, 485;

U. S. v. Holland, 111 F. (2d) 949, 953;

Old Mutual Benefit v. Francis, 148 F. (2d) 590, 591;

Chapman v. Dewey Lumber Co., 106 F. (2d) 482, 485;

12 *Cyc. Fed. Proc.,* 2d Ed. 254-256.

---

3. **THE CIRCUIT COURT HAS ADOPTED RESTRICTIVE DICTIONARY DEFINITIONS OF THE WORDS "CONTUSION" OR "WOUND" WITHOUT REGARD FOR THE RULES OF CONSTRUCTION OF THE LANGUAGE OF INSURANCE POLICIES APPLIED BY THE CALIFORNIA COURTS AND MOST OTHER JURISDICTIONS.**

Even the more conservative of the adverse opinions on the subject have studiously avoided any such expression as that indulged by the Circuit Court in effect limiting double indemnity liability to fatal incidents of violent bodily contact involving external impacts, blows or penetrations. Such a restrictive interpretation violates the fundamental doctrines, almost universally employed by the California Courts and Courts of most other jurisdictions, State and Federal, that where the language of a policy is susceptible of two constructions, that which is most favorable to the insured should be adopted; that any

uncertainties or ambiguities should be resolved liberally in favor of the insured and strictly against the insurer; that a risk fairly within contemplation is not to be avoided by any nice distinction or artificial refinement in the use of words; that every rational indulgence must be shown the assured; that interpretations which will give life, force and effect to the policy should be adopted; that the language must be flexible:

Mar See v. North American Accident Insurance Co., 190 Cal. 421, 424, 213 Pac. 42, 43;

Granger v. New Jersey Insurance Co., 108 C. A. 290, 293, 291 Pac. 698, 700 (hearing denied by Supreme Court);

Nelson v. Washington Fidelity National Insurance Co., 135 C. A. 731, 735, 27 Pac. (2d) 779, 781;

Carl Ingalls Inc. v. Hartford Fire Insurance Co., 137 C. A. 741, 745, 31 Pac. (2d) 414, 416;

Coniglio v. Connecticut Fire Insurance Co., 180 Cal. 596, 599, 182 Pac. 275, 276;

Fageol Truck & Coach Co. v. Pacific Indemnity Co., 18 Cal. (2d) 748, 751, 117 Pac. (2d) 669, 671;

Glickman v. New York Life Insurance Co., 16 Cal. (2d) 626, 635, 107 Pac. (2d) 252, 256;

Frenzer v. Mutual Benefit Health and Accident Ass'n., 27 Cal. App. (2d) 406, 416, 81 Pac. (2d) 197, 202;

Fitzpatrick v. Metropolitan Life Insurance Co., 15 Cal. App. (2d) 155, 158, 59 Pac. (2d) 199, 200;

Narver v. California State Life, 211 Cal. 176, 294 Pac. 393;

Meyerstein v. Great American Insurance Company, 82 Cal. App. 131, 255 Pac. 220.

This Honorable Court, after considering the effect of dictionary definitions, has said:

> "* * *. The phraseology of contracts of insurance is that chosen by the insurer and the contract in fixed form is tendered to the prospective policy holder who is often without technical training and who rarely accepts it with a lawyer at his elbow. So if its language is reasonably open to two constructions, that most favorable to the insured will be adopted. (Cases cited.)" *Aschenbrenner v. U. S. F. & G.,* 292 U. S. 80, 84, 78 L. Ed. 1137, 1140, 54 S. Ct. 590, 592;

and Appleman observes in his work on Insurance Law and Practice, Vol. 1, pp. 462, 463:

> "It is the layman, not the insurance attorney, who is insured; the latter would probably refuse a policy with the wordings now standard in them, knowing the effect which many courts have given thereto."

Other decisions of this Court to similar effect are:

Stipcich v. Metropolitan Life Insurance Co., 277 U. S. 311, 322, 48 S. Ct. 512, 72 L. Ed. 895;

Mutual Life Insurance Co. of N. Y. v. Hurni Packing Co., 263 U. S. 167, 174, 44 S. Ct. 90, 68 L. Ed. 235;

Thompson v. Phoenix Insurance Co., 136 U. S. 287, 10 S. Ct. 1019, 34 L. Ed. 408.

4. THE DICTIONARY DEFINITIONS OF "CONTUSION" OR "WOUND" ADOPTED BY THE CIRCUIT COURT ARE CONTRARY TO ESTABLISHED LEGAL DEFINITIONS OF THE WORDS.

Other Courts have established legal definitions of the words "contusion" and "wound", as used in these policies, which are strikingly at variance with the dictionary definitions adopted in the Circuit Court's opinion, and those definitions lend full support to the considered and advised opinion of the trial judge reported in 64 Fed. Supp. 427, R. 33. Such authorities are:

Mutual Life Insurance Co. v. Schenkat, 62 Fed. (2d) 236;

Warbende v. Prudential Insurance Co., 97 Fed. (2d) 749;

Huss v. Prudential Insurance Co., 37 Fed. Supp. 364;

Robinson v. Masonic Protective Ass'n., 87 Vt. 138, 88 Atl. 531;

Thompson v. Loyal Protective Ass'n., 167 Mich. 31, 132 N. W. 554;

Gasperino v. Prudential Insurance Co., 107 S. W. (2d) (Mo.) 819;

People v. Durand, 307 Ill. 611, 139 N. E. 78.

All of this respectable authority and more is summed up in the following restatement of the editors in 29 Am. Jur., p. 713:

> "The words 'contusion' and 'wound' as thus used have been variously defined. The term 'visible contusion' as used in a provision of a life insurance policy for double indemnity where death occurs as a result of bodily injuries effected

by external, violent, and accidental means, of which there is a visible contusion on the exterior of the body, includes any morbid change in or injury to either the subcutaneous tissue or the skin, which produces markings or discolorations that are visible upon the exterior of the body; and it is immaterial whether the 'visible contusion' results directly from the operation of the external, violent and accidental means upon the exterior of the body or indirectly from internal injuries which are effected by such means. A 'wound' has been defined in law as a lesion of the body, and a lesion is a hurt, loss, or injury, or any morbid change in the structure of organs or parts * * *."

---

5. **THE DECISION IS CONTRARY TO THE BETTER CONSIDERED CASES, STATE AND FEDERAL, ON THE "CONTUSION" OR "WOUND" ISSUE.**

The decision of the Circuit Court is in direct conflict with the following opinions of the Federal and State Courts on the contusion or wound issue:

Warbende v. Prudential Ins. Co., 97 F. (2d) 236;

Mutual Life v. Schenkat, 62 F. (2d) 236;

Wiecking v. Phoenix, 116 F. (2d) 90;

Huss v. Prudential Ins. Co., 37 Fed. Supp. 364;

American Nat'l. Ins. Co. v. Fox, 184 S. W. (2d) 937;

Thompson v. Loyal Protective Ass'n., 167 Mich. 31, 132 N. W. 554;

Cavallero v. Travelers Ins. Co., 197 Minn. 417, 267 N. W. 370;

Lewis v. Brotherhood Accident Co., 194 Mass. 1, 79 N. E. 802;

Hill v. Great Northern Life, 186 Wash. 167, 51 P. (2d) 405;

Robinson v. Masonic Protective Ass'n., 87 Vt. 138, 88 Atl. 531;

Masonic Mutual Acc. etc. v. Campbell, 156 Ark. 109, 245 S. W. 307.

---

6. **THE CIRCUIT COURT'S DECISION IS CONTRARY TO EXISTING INDICATIONS OF WHAT THE HOLDING OF THE CALIFORNIA COURTS WOULD BE ON THE "CONTUSION OR WOUND" ISSUE.**

In an opinion not ~~disclosing whether~~ involving as the "contusion or wound" limitation ~~was~~ is one of the policy's terms, the California District Court of Appeal (hearing denied by the Supreme Court) held, in *Trueblood v. Maryland Insurance Co.* (129 Cal. App. 102, 108, 18 P. (2d) 90, 92), supra:

> "* * *. It is not necessary that the accidental cause shall leave visible external contusions or abrasions of the body. A bodily injury may be either external or internal. If it becomes the direct exclusive cause of death it creates liability * * *."

In deciding the *Trueblood* case, the California Court cited with approval the *Washington* case of *Horsfall v. Pacific Mutual Life Ins. Co.,* 32 Wash. 132, 72 P. 1028, which was one where the insured died of violent dilation of the heart, the policy providing against coverage if there were "no visible

external marks upon the body (the body itself not being considered such mark) produced at the time of and by the accident."

The Washington Court said:

> "It is also urged that the injuries causing death left no visible external mark, produced at the time of and by the accident, upon the body of the deceased, and therefore the injury was one excepted from the policy. The evidence as stated above shows that immediately after the accident the deceased became deathly pale and sick, his hands and feet became cold, the perspiration stood out on his face and hands. The next day after the accident his skin, which previously had been ruddy, became a bluish gray color, and remained so until his death. These, we think, were visible external marks, and sufficient to bring the case within the terms of the policy. The rule is stated in 1 Cyc. 252 as follows: 'The external and visible sign or mark required by the proviso that the policy will not cover "any injury, fatal or otherwise, of which there is no visible mark upon the body" need not necessarily be a bruise, contusion, laceration, or broken limb; it may be any visible evidence of an internal strain. Nor is it necessary that such evidence be present immediately after the happening of the accident.' (Citing many cases.)"

The Washington Supreme Court later cited the *Horsfall* case in the "contusion, wound or other marks or evidence of injury on the exterior of the body at the place of injury" case of *Hill v. Great Northern Life Ins. Co.*, 186 Wash. 167, 57 P. (2d) 405, in affirming liability for an internal injury

(brain hemorrhage). (Cited with approval by the Ninth Circuit Court of Appeals in the coronary thrombosis case of *Order of United Commercial Travelers of America v. Groves,* 130 F. (2d) 863, 865, note).

Since the California Court cited the *Horsfall* case from Washington with approval, there would appear to be justification for anticipation it would follow the later *Hill* case from that state which also cited the *Horsfall* case in arriving at its conclusion that liability existed.

Therefore, when coupled with the well settled doctrine in California that where the language of a policy is susceptible of two constructions that which is most beneficial to the insured should be adopted, and the numerous contusion or wound cases cited herein, it is reasonable to conclude that every indication leads to the probability that the California Courts would have arrived at a conclusion opposed to that of the Circuit Court on the contusion or wound issue. Consequently the Circuit Court erred in not determining, and following, the indications of what the California decision would be:

Huss v. Prudential Ins. Co., 37 Fed. Supp. 364, 366;

Erie R. Co. v. Tompkins, 304 U. S. 64, 58 S. Ct., 817, 82 L. Ed. 1188;

3 *Cyc. of Fed. Proc.* 2d Ed. Sec. 608, p. 91, Sec. 600, pp. 63 et seq.

7. THE CIRCUIT COURT CITES ONLY ONE CASE CONCERNED WITH THE "CONTUSION OR WOUND" ISSUE IN ITS ENTIRE OPINION AND IT IS NOT DETERMINATIVE OF THE ISSUES IN THE INSTANT CASE.

The Circuit Court, in relying exclusively on the case of *Paul Revere Life v. Stanfield* (C.C.A. 10) 151 Fed. (2d) 776, and in asserting its facts are "identical", proceeded under a misapprehension of the legal effect of that decision.

The majority opinion in the *Stanfield* case says in part:

> "* * *. In the absence of any guidance from the Supreme Court of Oklahoma we choose to follow those decisions which hold manifestations such as outlined above insufficient to constitute a wound or contusion upon the exterior of the body."

The dissenting opinion declares:

> "* * *. The trial court's prophecy of what course the Supreme Court of Oklahoma would follow is as good as mine, and I cannot agree to a reversal of its judgment simply because the authorities on the other side of the question appeal to me as most logical and just * * *."

As last above pointed out there are numerous indications by the California Courts for the guidance of the Ninth Circuit Court of Appeals leading to a conclusion on the "contusion or wound" issue contrary to the decision reached. It has also been previously herein demonstrated that the Circuit Court's expressed concept of the California rule for construction of insurance contracts is erroneous.

It has been previously pointed out herein that if the Circuit Court followed the majority's conclusion in the *Stanfield* case on the "contusion or wound" issue (as it did) and if it did nor err in so doing, it was thereupon the Court's obligation and its function to decide the then predominant issue whether the accidental means death from wholly internal injury is encompassed by the double indemnity provisions of the policies where the accident is such that a "contusion" or "wound", as restricted by the Court's opinion, cannot occur because no external impact, blow or penetration was involved in the fatal accidental violence, and failure to have an autopsy was excused.

The facts of the instant case, therefore, are not "identical" with the *Stanfield* case—the issues are not ultimately the same—and the governing legal principles on the further issue are neither decided nor mentioned therein.

For these reasons it is most respectfully submitted the Circuit Court's reliance on that case is unjustified. For the same reasons the now Respondent's contention that the majority opinion therein was controlling was ill founded. For like reasons the contention the now Respondent will in all probability urge upon this Court—that since this Court denied a petition for writ of certiorari in the *Stanfield* case it should also deny such a writ in the instant case—will be unsupportable.

PRAYER.

Wherefore, it is most respectfully submitted a writ of certiorari should issue out of this Honorable Court to the Circuit Court of Appeals for the Ninth Circuit to review its decision herein, as modified, and that upon review the judgment of the Circuit Court be reversed and such other and further relief be afforded the petitioner as this Court shall deem proper.

Dated, San Francisco, California,
June 9, 1947.

HERBERT W. ERSKINE,
Attorney for Petitioner.

M. MITCHELL BOURQUIN,
JOHN J. HEALY,
S. J. H. ALLEN,
of Counsel.

(Appendices "A" and "B" Follow.)

Appendix "A"

In the
United States Circuit Court of Appeals
for the Ninth Circuit

Massachusetts Mutual Life Insurance Company, a corporation, Appellant, vs. Muriel C. Pistolesi, Appellee.	No. 11,349 March 7, 1947

Upon Appeal from the District Court of the United States for the Northern District of California, Southern Division

---

Before: Denman, Healy and Orr, Circuit Judges.
Denman, Circuit Judge.

The Massachusetts Mutual Life Insurance Company appeals from a judgment on a jury's verdict holding it liable under a double indemnity clause of the insurer's policy, payable to the appellee.

On November 2, 1938, the insurer issued to Norbert H. Pistolesi two life insurance policies—one for $5,000 and the other for $2,000. Mr. Pistolesi died on October 5, 1941, and the ordinary benefits payable under the policy have been satisfied. The claim in suit is based on the double-indemnity feature of the policies.

The question here is whether the appellee, the plaintiff below, has maintained her burden of proof that the accident, which we assume caused the death, produced "a visible contusion or wound on the exterior of the body" of the deceased within the policies' provisions that

> "Upon receipt of due proof that the death of the insured occurred * * * as the result of bodily injury effected solely through external, violent, and accidental means, as evidence of which injury (except in case of drowning or of internal injuries revealed by an autopsy) there is a visible contusion or wound on the exterior of the body, and that such death occurred * * * as a direct result thereof, independently and exclusively of all other causes * * *"

On September 14, 1941, three weeks prior to his death, Mr. Pistolesi, aged 39 years, was on board a pleasure yacht, the *Eloise*. He was traveling hand-over-hand suspended from a wire which was strung between two masts of the boat. He reached for the wire with one hand, missed the wire (so that his body swung around), and he held on to the wire with the other hand. Then he went back to the mast and remained there for a few minutes while his photograph was taken by another guest on the boat. Pistolesi then climbed down the mast to the deck.

From that occasion until his death, Pistolesi intermittently complained of pain in his chest, and on physical effort he perspired freely, his face became pale, and his lips were sometimes blue. He lost his customary vigor, he walked in a shuffling manner, at times his breathing was labored, and his countenance was drawn.

Early in the morning of October 5, 1941, he awakened and complained of severe pain. A Dr. Wagner was called, but before Pistolesi could be removed to a hospital he died.

There was no autopsy. The coroner was not notified. The body was cremated on October 7, 1941. The official death certificate signed by Dr. Wagner stated that the immediate cause of death was "acute myocardial failure due to coronary thrombosis—duration one week."

We assume as correct the appellee's contention that the happenings to Pistolesi on the yacht's rigging accidentally caused coronary thrombosis and, as a result, his death. We do not agree with appellee's contention that either mere sweating or paleness of skin or *recurring blueing of the lips of Pistolesi* after such exertion constitutes a "visible contusion or wound on the exterior of the body." Appellee gave no evidence of any wound and we think none of a "contusion."

The California Civil Code, Section 1644, provides that "The words of a contract are to be understood in their ordinary and popular sense." In California, insurance policies are so construed. Cf. Greenberg v. Continental Casualty Co., 24 Cal. App. 2d 506, relying on the dictionary definition of the policy's words. The Supreme Court states of dictionary definitions of the word "passenger" that "While for the purpose of judicial decision dictionary definitions often are not controlling, they are at least persuasive that meanings which they do not embrace are not common." Aschenbrenner v. United States Fidelity & Guaranty Co., 292 U. S. 80, 85.

Webster's New International Dictionary, 2d Ed., defines a "contusion" as "a bruise; and injury attended with more or less disorganization of the subcutaneous tissue and effusion of blood beneath the skin but without breaking the skin." Funk & Wagnall's New Standard Dictionary as

> "1. The act of bruising by striking or pounding, or the state of being so bruised; also a pulverizing by beating or pounding.
>
> 2. Surg. A bruise; an injury, as from a blow with a blunt instrument, that does not make an open wound."

The court recognizes that an injured heart may drive less blood to the lips and that they will appear blue, as they did with the deceased just after his strain on the yacht's rigging. This, however, is no evidence that the lips were contused any more than if they turned blue from a sudden gust of fog laden air.

It is possible that such a heart affliction as here claimed may gradually deposit in the veins and arteries material which will slow the circulation and in time cause a blueing of the lips by such deposit there. It is not necessary to decide whether this would be a contusion. Here the testimony is that the blue lips were seen only immediately after the deceased had descended from the rigging. It is not claimed that he sustained a blow on the lips or that they were swollen.

The uncontradicted medical testimony corresponds with the dictionary definitions. It is

> "Q. State whether blue lips are wounds or contusions?

A. Blue lips are not a wound or contusion, not a bruise.

Mr. Healy. I move to strike the answer as not responsive, it can be answered yes or no.

A. The answer is no.

A. Blueness of the skin is a result of the oxygen content of the blood,—veinous blood is blue and the oxygenized blood is red. When the heart action is insufficient and the blood is not pumped properly and sufficient oxygen does not enter the blood, that imparts a blue color or character to the skin, the blood becomes blue, and that imparts the color to the skin. There is no damage and there is no wound or contusion.

Q. Is there any damage to the subcutaneous tissue?

A. There is not.

Q. In the case of pallor is there any damage to the subcutaneous tissue?

A. There is not.

Q. In case of pallor is there any effusion of blood beneath the skin?

A. No.

Q. In case of blue lips is there any effusion of blood beneath the skin?

A. No."

Our conclusion that appellee's burden of proof of contusion has not been sustained by the evidence of pallor and blue lips is in accord with the decision on the identical facts in the case of Paul Revere Life v. Stanfield (CCA 10), 151 F. 2d 776, 777, where the court construed the same policy provision.

The judgment is reversed.

(Endorsed:) Opinion. Filed March 7, 1947. Paul P. O'Brien, Clerk.

Appendix "B"

United States Circuit Court of Appeals
for the Ninth Circuit

Massachusetts Mutual Life Insurance Company (a corporation), Appellant, vs. Muriel C. Pistolesi, Appellee.	No. 11,349 Order

Upon Appellant's Petition for Modification of Opinion and Decree and Appellee's Petition for Rehearing and Stay of Mandate

Before: Denman, Healy and Orr, Circuit Judges.

It is ordered that the paragraph beginning third on page 3 of the printed copy of our opinion filed herein on March 7, 1947, be modified to read as follows:

> "It is possible that such a heart affliction as here claimed may gradually deposit in the veins and arteries material which will slow the circulation and in time cause a permanent blueing of the lips by such deposit therein. It is not necessary to decide whether this would be a contusion. Here the testimony is that the blue lips appeared only when the deceased physically exerted himself. It is not claimed that he sustained a blow on the lips or that they were swollen."

It is ordered that the last sentence of that opinion be stricken and the following substituted therefor:

"It appears that appellant was entitled to have given to the jury its requested instruction for a verdict in its favor and to have granted its motion for a judgment notwithstanding the verdict. It is now entitled to have vacated the judgment appealed from and to have one entered that plaintiff take nothing by her complaint and for its costs. Central Vermont Railway v. Sullivan, 86 F. 2d 171, 174 (CCA 1); Brennan v. Baltimore & Ohio Railroad Co., 115 F. 2d 555 (CCA 2); Leader v. Apex Hosiery Co., 108 F. 2d 71, 81 (CCA 3); Southern Railway Co. v. Bell, 114 F. 2d 341, 343 (CCA 4); Connecticut Mutual Life Insurance Co. v. Lanahan, 113 F. 2d 935 (CCA 6); Burnet v. Kresge Co., 115 F. 2d 713, 716 (CCA 7); Paul Revere Life v. Stanfield, 151 F. 2d 776 (CCA 10); Baltimore v. Redman, 295 U. S. 654, 661; National City Bank v. Oelbermann, 298 U. S. 638.

"The judgment appealed from is reversed and the cause remanded to the District Court for the action above indicated."

The petition for rehearing is denied.

William Denman,
United States Circuit Judge,
William Healy,
United States Circuit Judge,
Wm. E. Orr,
United States Circuit Judge.

(Endorsed) Filed: May 2, 1947. Paul P. O'Brien, Clerk.